

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

OSTAP KAPELIOUJNYI,

Plaintiff,

v.

CIV 09-0866-LH-GBW

L. VAUGHN, as Warden and in his
individual capacity, B. JUDD, as Assistant
Warden “Acting Chaplain” and in her
individual capacity, CORRECTIONS
CORPORATION OF AMERICA, CCA,

Defendants.

ORDER TO FILE A MARTINEZ REPORT

This *pro se* prisoner civil rights matter is before the Court *sua sponte*. The factual and procedural history is described in detail in the Proposed Findings and Recommended Disposition filed on January 22, 2010. *Doc. 14*.

As of this date, the Court is awaiting any objections to the Proposed Findings and Recommended Disposition. Although the objections are not yet due, because Defendant did not seek to dismiss all of Plaintiff’s claims including the central First Amendment claim, it is very likely that some claims will proceed after the district judge’s *de novo* review of the Proposed Findings and Recommended Disposition. Therefore, it is appropriate to proceed with the instant Order.

Under *Martinez v. Aaron*, 570 F.2d 317, 320 (10th Cir. 1978), this Court may order

defendants to investigate the incident or incidents underlying Plaintiff's lawsuit and submit a report of their investigation in order to develop a factual or a legal basis for determining whether a prisoner plaintiff has a meritorious claim. *See, e.g., Gee v. Estes*, 829 F.2d 1005, 1007 (10th Cir. 1987).

A *Martinez* Report may be used in a variety of contexts, including motion for summary judgment or *sua sponte* entry of summary judgment. When a *Martinez* Report is used for summary judgment purposes, the *pro se* plaintiff must be afforded an opportunity to present conflicting evidence to controvert the facts set forth in the report. *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991).

Wherefore,

IT IS HEREBY ORDERED that Defendant file a *Martinez* Report within 90 days of receipt of this Order in accordance with the instructions below:

1. Defendant's comprehensive *Martinez* Report shall address all of Plaintiff's allegations as well as any defenses Defendant wishes to pursue, and it should include, but is not limited to: whether documents or other records pertaining to the events exist; whether prison policies or regulations address the situation; whether any video footage of either alleged incident exists; and whether any photographs of Plaintiff after either alleged incident exist.

2. If documents and records do exist, Defendant shall include copies of them as attachments to the *Martinez* Report. The attachments should be arranged in a logical order and be Bates-stamped or otherwise be clearly serially marked;

3. Defendant must provide affidavits to properly authenticate submitted documents, and may also submit other affidavits in support of the *Martinez* Report;

4. The submission of documents alone shall not be considered in compliance with this Order. Defendant is also expected to prepare the "report" portion of the

Martinez Report that discusses the claims and the submissions that relate to them;

5. The Court is aware that materials contained in corrections files may be sensitive and that there may be valid reasons for keeping such information secret. As such, Defendant may redact confidential portions of documents submitted with the *Martinez* Report and provide that version to Plaintiff. Alternatively, he may request that Plaintiff not be permitted to review certain portions of the *Martinez* Report and its attachments. If so, Defendant must make his objections to the Court fourteen (14) days prior to the *Martinez* Report filing and service date below. The entire *Martinez* Report must be submitted along with the objections, both under seal, to the Court for ruling;

6. Plaintiff shall file and serve his response to the Defendant's Motion or Report within 30 days of its filing; and

7. Defendants shall file and serve their reply, if any, within 14 days of the filing of Plaintiff's Response.

THE PARTIES ARE HEREBY GIVEN NOTICE that the *Martinez* Report may be used in deciding whether to grant summary judgment on Plaintiff's claims, whether by motion or sua sponte; as such, the parties should submit whatever materials they consider relevant to Plaintiff's claims. *See Hall*, 935 F.2d 1106.



UNITED STATES MAGISTRATE JUDGE